MOTION
SEP 13 1986

Nos. 86-219, 86-224, 86-225 and 86-226

In The

Supreme Court of the United States

October Term, 1986

SOUTHERN UNION COMPANY,
SOUTHLAND ROYALTY COMPANY,
EXXON CORPORATION, and
UNICON PRODUCING COMPANY,

Petitioners,

v.

JICARILLA APACHE TRIBE,
DONALD P. HODEL, Secretary of the
United States Department of the Interior,
and STATE OF NEW MEXICO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation (MSLF or the Foundation) respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court,

for leave to file the attached brief *amicus curiae* in support of the Petitioners. The consent of the attorneys for the Petitioners Southern Union Company, Southland Royalty Company, Exxon Corporation, and Unicon Producing Company and the consent of the attorneys for Respondents Secretary of the Interior and the State of New Mexico, has been obtained.[1] The consent of the attorney for the Respondent Jicarilla Apache Tribe was requested but refused.

In support of this motion, the Foundation states:

1. MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation takes a great interest in questions of law having a national scope and especially those that have a direct impact in the Mountain States region, including the State of New Mexico where the instant case arose. Many MSLF members enter into contracts with Indian tribes. If this decision is allowed to stand, their contract interests may also be affected.

2. The issue raised by this case—whether the Secretary's fiduciary duty to Indians can abrogate major tenets of contract law and construction simply because one of the contracting parties is an Indian tribe—has far reaching ramifications for all parties who seek to enter into contracts with Indians. As *amicus curiae,* the Foundation seeks to bring before this Court fundamental policy

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[1]MSLF has filed the written consents of these parties with the Clerk of the Court.

considerations regarding the adverse impacts the Tenth Circuit's decision has on the integrity of contracts that are the cornerstone of the American economic system.

3. These considerations, while directly applicable to the instant case, transcend the specific interests of the parties hereto and thus may not be adequately addressed by the existing parties.

For the foregoing reasons, MSLF respectfully requests that its motion for leave to file the attached brief *amicus curiae* be granted.

Dated this 11th day of September, 1986.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amicus curiae in support of the position of Petitioners in these cases.

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INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system.

In this case, the Foundation seeks to maintain the viability and integrity of contracts entered into with Indian tribes. Under the Tenth Circuit Court of Appeals decision, contracts with Indian tribes are no longer governed by general principles of contract law and construction. Under the rubric of the government's fiduciary duty to Indians, the Tenth Circuit has held that every contract provision can be reinterpreted at a later date in a manner contrary to the intent and course of performance of the parties, and in defiance of longstanding administrative interpretation of regulations and trade usage.

The uncertainty injected into existing and future contracts with Indian tribes by the Tenth Circuit's ruling can only result in inefficiency and expense to all parties involved and the general public.

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STATEMENT OF THE CASE

Amicus curiae adopts Petitioners' statement of the case in their petitions for writ of certiorari.

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REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S APPLICATION OF THE SECRETARY'S FIDUCIARY DUTY TO REFORM A CONTRACT WITH AN INDIAN TRIBE CONFLICTS WITH OTHER COURTS' DECISIONS CONSTRUING CONTRACTS WITH INDIAN TRIBES IN ACCORDANCE WITH GENERAL PRINCIPLES OF CONTRACT LAW.

By rewriting the lease agreements between Petitioners and the Indian tribe, the lower courts ignored the intent and understanding of the contracting parties when the contract was entered. The contract was revised, over a quarter of a century later, in light of some new interpretation of a royalty regulation based upon the Secretary's fiduciary duty to Indians. Under the Tenth Circuit's novel interpretation not only can contracts with Indians be unilaterally reinterpreted in favor of the Indian tribe, but the unaware private party can be held retrospectively liable for the cost of the Secretary's perceived breach of trust.

No finding was ever made below that the Secretary's longstanding interpretation of the royalty regulation,[1] generally, or as applied in this case prior to the present litigation, was unreasonable. In fact, royalty calculations based upon the value of the unprocessed wet gas at the wellhead have been uniformly applied and accepted in the industry since this regulation was adopted, regardless of whether an Indian tribe was a party to the lease. As the Tenth Circuit panel found,

> From 1950 to 1979 without exception, and without variation, the Secretary and the USGS had construed the

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[1] 25 C.F.R. § 211.13, J. App. 224a-225a.

> lease provisions and the regulations to require dual accounting not by all lessees, but *only* in instances where the lessee owned the processing plant (or received added money for its products).

J. App. 24a.

The intent of the parties, as evidenced by their course of performance, longstanding administrative interpretation of the regulation, and trade usage should form the basis of interpretation of the leases at issue.[2]

In this case, the lease contracts involved repeated occasions for payment of royalties and opportunity for objection by the United States and the Indian tribe. However, no objection was made for over twenty years. It is, therefore, clear that the parties to the leases had a meeting of the minds as to the meaning of the royalty provision.

In *United States v. Lewiston Lime Co.*, 466 F.2d 1358, 1360 (9th Cir. 1972), the court made clear that the intent of the parties is overriding, even when the contract concerns a lease agreement with an Indian tribe. In that case, after seventeen years of accepting royalties from the lessees without objection under a lease to mine limestone from Indian land, the United States sued to impose a different method of calculating the royalty in order to increase payments to the Indians. The court, finding the roy-

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[2]See Restatement (Second) of Contracts § 202 (1979) (a contract should be construed to reflect the intent of the parties at the time it was formed). *See also* F. Cohen, *Handbook of Federal Indian Law*, 224 n.60 (1982 ed.) (agreements, which directly involve negotiations with Indian tribes, should be construed as the Indians would have understood them).

The intent of the parties to a contract is often best evidenced by their conduct and course of performance over the life of the contract. Any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the contract provisions. *See* U.C.C. § 2-208(1) (1978).

alty provision ambiguous, held that the contract was to be interpreted based upon the original intentions of the parties. *Accord, United States v. Wichita Industries, Inc.*, 390 F.Supp. 1154, 1157 (W.D.Okla. 1974) (in interpreting royalty provisions in oil and gas leases on Indian lands, "[c]ourts should strive to ascertain the intent of the parties.")

In another case, additional royalties were denied the Indian lessors because the conduct of the Secretary and the lessee showed a consistent interpretation of the lease as to royalty rights that did not include additional payments. *White Bird v. Eagle-Picher Co.*, 390 F.2d 831 (10th Cir. 1968).

In addition to course of performance, trade usage is also important in interpreting contract provisions. The Tenth Circuit has previously held that parties to a contract are presumed to be aware of well-defined trade usage. *United States v. Stanolind Crude Oil Purchasing Co.*, 113 F.2d 194 (10th Cir. 1940). In that case, the United States had sued to recover additional royalties under an oil and gas lease on Indian land. The court denied recovery holding that, in computing the Indians' royalty interest under existing regulations and an executive order, it would be presumed that the United States knew of the trade usage of deducting a percentage of oil from the royalty calculation to account for impurities, therefore lessees properly deducted three percent from the royalty payment to the Indian tribe. *Id.* at 200.

The Tenth Circuit decision disregards the intent of the parties and ignores other important precepts of contract construction simply because one of the contracting parties is an Indian tribe. Other federal court decisions

have not used the fiduciary duty doctrine to reform contracts made with Indian tribes when to do so runs counter to principles of contract law. Rather, these courts have construed lease contracts with Indian tribes like any other contract. The decision of the Tenth Circuit conflicts with these other courts because it ignores the basic principles of contract law.

II. THE USE OF THE FIDUCIARY DUTY DOCTRINE AS CONCEIVED BY THE TENTH CIRCUIT THREATENS FUTURE REFORMATION OF MANY OTHER CONTRACTS WITH INDIAN TRIBES.

The Tenth Circuit's decision destabilizes the entire field of contract law when one of the contracting parties is an Indian tribe. The ramifications of this case go far beyond the facts and make contracting with Indians an inherently risky proposition.

Rather than facilitate agreements between Indians and private parties, the holding of the Tenth Circuit will only serve to thwart efforts at negotiating such contracts by injecting uncertainty into them. Such a result will be costly and inefficient for everyone involved.

Private parties will be loath to enter into contracts with Indians for fear that the contract will be interpreted at a later date to their detriment, and in a manner they never intended. In addition, private parties will be compelled to require different provisions in contracts with Indians than in contracts with other private parties in order to protect themselves.

There are a multitude of existing contracts with Indian tribes for development of their natural resources. all of which are now open to reformation under the Tenth Circuit's ruling. Indian tribes have also entered into con-

tracts for goods and services which, under the lower court decision, can now be put at issue. Given the uncertain validity of the terms and conditions of these contracts engendered by the Tenth Circuit's decision, private parties face heretofore uncalculated burdens in doing business with Indian tribes. Risks of this nature, especially in light of the amount of retrospective relief afforded in this case, will deter private parties from entering into contracts with Indians. Surely this is not the result intended by Congress in its attempt to promote Indian self-sufficiency and to permit Indians to realize economic benefit from the natural resources on their lands.

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CONCLUSION

There is a clear and immediate need for this Court to define a workable standard to apply in interpreting contracts between Indian tribes and private parties. The standard enunciated by the Tenth Circuit replaces the stability and predictability of existing rules of contract law and construction with chaos. The Court should grant the Certiorari Petitions and resolve the confusion that exists.

Dated this 11th day of September, 1986.

Respectfully submitted,

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